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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 591

ROY CURTIS CLEVELAND,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

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Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

---

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Roy Curtis Cleveland, prays that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois, Second Judicial District, entered on January 23, 1969, affirming his conviction in the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois, of the offense of theft.

Citation to Opinion Below.

The opinion of the Appellate Court, printed in Appendix C hereto, infra, page 8a, is reported in 104 Ill. App. 2d 415, 244 N.E. 2d 212.

Jurisdiction.

The judgment of the Appellate Court was entered on January 23, 1969. (R. 4.) A timely petition for rehearing was filed on February 14, 1969. (R. 10.) It was denied on February 20, 1969. (R. 11.) A timely petition for appeal as a matter of right or in the alternative for leave to appeal to the Supreme Court of Illinois was filed on March 31, 1969. It was denied on May 26, 1969. (R. 12.) A timely motion for reconsideration of the order denying the petition for appeal as a matter of right or in the alternative for leave to appeal was filed on June 11, 1969. It was denied on June 17, 1969. (R. 13.) Thereupon a mandate was issued.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

The federal questions sought to be reviewed were raised in the trial court (e. g. motion to dismiss indictment A. 7, motion to vacate portions of order for probation A. 15), and also in the reviewing courts (e. g. petition for rehearing R. 10, and petition for leave to appeal).

Questions Presented.

1. Whether the Illinois statute which created the offense of theft is unconstitutional.

2. Whether the Illinois court had jurisdiction of the subject matter of the cause.

3. Whether petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation.

4. Whether petitioner was deprived of his constitutional right to a fair trial.

   (a) Whether the use of the auditor's report denied petitioner due process of law because it was not a part of the record.

   (b) Whether the condition of probation relative to confinement is void.

   (c) Whether the condition of probation relative to restitution is void.

   (d) Whether the Illinois court may properly require the payment of any loss or damage as a condition of probation because it constitutes imprisonment for debt in the event that probation is revoked upon default in payment.

Constitutions and Statutes Involved.

The 5th, 6th and 14th Amendments to the Constitution of the United States and Sections 2, 9, 10 and 12 of Article II of the Constitution of the State of Illinois are printed in Appendix A hereto, infra, page 1a.

Section 16-1 of the Criminal Code of 1961, and Sections 111-3, 112-2, 117-1, 117-2 and 117-3 of the Code of Criminal Procedure of 1963 are printed in Appendix B hereto, infra, page 3a.

Statement of the Case.

This is a criminal prosecution.

Petitioner was indicted on December 14, 1966, by the grand jury of Winnebago County, in the State of Illinois, for the offense of theft.

The indictment, consisting of one count, is, as follows:

State of Illinois
In the Circuit Court of the 17th Judicial Circuit
County of Winnebago

The People of the State of Illinois

vs. No. 767

Roy Curtis Cleveland,
Defendant

Bill of Indictment

The Grand Jury charges:

That on the 30th day of September, 1966, in the County of Winnebago and State of Illinois, one Roy Curtis Cleveland committed the offense of Theft, in that he knowingly obtained unauthorized control over certain checks and money of the legal money and currency of the United States of America, having a value exceeding One Hundred Fifty Dollars ($150.00), the property of Cherry Valley Fire Protection District, a municipal corporation, Roy Curtis Cleveland thereby intending to deprive Cherry Valley Fire Protection District, a municipal corporation, permanently of the use or benefit of said

property, in violation of paragraph 16-1, Chapter 38, Illinois Revised Statutes.

A True Bill
Richard A. Reece
Foreman

The petitioner filed a motion for change of venue from the judges of the county on December 16, 1966.

Being arraigned in open court, the petitioner was furnished with a copy of the indictment and lists of witnesses and jurors on December 16, 1966.

The motion for change of venue was granted by Honorable Albert S. O'Sullivan, Chief Judge. The cause was continued to January 4, 1967.

Thereupon, it was ordered that the original bond in the sum of $10,000 heretofore given be continued.

The petitioner entered a plea of not guilty before Honorable Harry D. Strouse, Jr., Judge, on January 4, 1967.

He entered a motion for a complete list of witnesses which was granted.

He then requested a bill of particulars which was to be filed in writing within 20 days. It was ordered that the State's Attorney file the bill of particulars within 15 days thereafter.

The case was set for trial on March 20, 1967.

List of prosecution witnesses was filed on January 20, 1967.

Consent of petitioner, stipulation and order adjourning cause from April 17, 1967, until June 26, 1967, were filed on April 19, 1967.

Leave was granted Berry & Simmons to withdraw as counsel for petitioner on June 14, 1967.

Entry of appearance of John R. Snively as counsel for the petitioner was filed on June 21, 1967.

The petitioner filed a motion to dismiss the indictment on June 26, 1967.

In his motion he raised, among other things, the constitutionality of the statute upon which the indictment was based. The trial court ruled upon the constitutionality of the statute and other points raised in the motion. It held the statute constitutional and valid. The motion was denied on June 26, 1967.

The petitioner entered his motion for a continuance which was granted. The case was set for trial on July 17, 1967.

The petitioner withdrew his plea of not guilty and entered a plea of guilty on July 17, 1967. The plea was accepted.

Leave was granted the petitioner to file a petition for release on probation which was referred to the probation officer to investigate and report. The case was continued to October 31, 1967.

The report of the probation officer was filed on October 31, 1967.

The petition for release on probation was heard and granted on October 31, 1967. The petitioner was admitted to probation for a period of 5 years conditioned upon his confinement in the Illinois State Farm at Vandalia, Illinois, for a term of 5 months beginning November 27, 1967, and also that within 30 days from his release there-

from that a final amount of restitution be determined upon the agreement of the petitioner or by court order, and that within 90 days after the amount of restitution has been so established that the amount be paid in full.

The petitioner filed a motion to vacate portions of the order for probation relative to confinement and restitution on November 16, 1967. The motion was heard and denied on November 22, 1967.

The petitioner entered a motion that his original bail stand as bail on appeal on November 22, 1967, which was granted. In less than an hour the trial court vacated the order and denied a motion that the condition of confinement be stayed and an appeal bond be fixed. The original bond was ordered to stand continued until noon, November 27, 1967.

A notice of appeal was filed on November 24, 1967.

On motion it was ordered by Honorable Roy J. Solfisburg, Jr., Chief Justice of the Supreme Court, on November 25, 1967, that the petitioner be admitted to bail and the condition of confinement stayed, that the original bail stand as bail pending appeal, and that the mittimus heretofore issued by the trial court be recalled.

From the judgment of conviction and sentence or confinement, and orders, the petitioner appealed to the Appellate Court of Illinois, Second Judicial District.

The judgment of the trial court was affirmed on January 23, 1969, and a rehearing was denied on February 20, 1969.

Application for appeal as a matter of right or in the alternative leave to appeal was then made to the Supreme Court of Illinois.

Reasons for Granting the Writ.

1. The Illinois Statute which created the offense of theft is unconstitutional.

The Constitution of the United States provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny the equal protection of the laws. (U. S. Const. Amend. 14.)

The Constitution of the State of Illinois has a similar provision. (Ill. Const. 1870, Art. II, Sec. 2.)

The statute which created the offense of theft provides:

"A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty.

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to

exceed one year, or both. A person convicted of such theft a second or subsequent time, or after conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years."

Ill. Rev. Stat. 1965, Chap. 38, Sec. 16-1.

The Criminal Code of 1961 became effective January 1, 1962. It made far reaching changes in the scope, philosophy, terminology, and organization of the law of crimes.

Section 16-1 of the Code made a substantial change in prior laws by the codification of a large number of separate offenses against property, including larceny, embezzlement and false pretenses, within the single offense of theft. The change in name is not merely one of form, but it is of substance.

Theft is purely a statutory offense. It did not exist at common law. It is much broader than larceny.

In its opinion, the Appellate Court said:

"The test to be applied to a statute is whether it is sufficiently definite and certain to enable all men to know what acts are proscribed and what conduct will make them liable to punishment. *The People* v. *Patrick,* 38 Ill. 2d 255, 257, 258; *People* v. *Williams,* 79 Ill. App. 2d 56, 59, 60. We find that sec. 16-1 (a) adequately apprises the defendant of the charge against him and encompasses the highly technical description of embezzlement by a public officer before codification, namely that the defendant knowingly exerted unauthorized control over the property of another."

There are no allegations whatsoever which charge the petitioner with embezzlement by a public officer. The court

below gave no explanation for its finding that the charge encompassed embezzlement by a public officer before codification. In addition, the indictment charged that the petitioner knowingly obtained unauthorized control and not "exerted unauthorized control".

The cases cited are not applicable. They fail to answer the constitutional question raised. It is submitted that *People* v. *Green,* 368 Ill. 242, answers the question. In *Green* at page 245, the court said:

> "In creating an offense by statute which was not a crime at common law such statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. (16 Corpus Juris 67.) If the law is of such doubtful construction and described the act denominated as a crime in terms so general and indeterminate as to make the question of criminality dependent upon the opinions of the individuals who happen to constitute the court and the jury, and of such a nature that honest and intelligent men are unable to ascertain what particular act is condemned by the State, the law is incapable of enforcement and will be held null and void."

The court below should have followed it.

If a statute does not give fair warning of the conduct which it makes criminal, then it is unconstitutional because it denies due process of law.

The applicable rule was well stated by this Court in *Wright* v. *Georgia,* 378 U.S. 284, 83 S. Ct. 1240, 10 L. ed. 2nd 349 (1963).

At page 356, 10 L. ed. 2d 349, the court said:

> "It is well established that a conviction under a criminal enactment which does not give adequate no-

tice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618; *Connally* v. *General Constr. Co.,* 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126; *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 ALR 1045; see also *United States* v. *National Dairy Products Corp.,* 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594."

The phrase "obtains or exerts unauthorized control" is a catch all phrase which can make criminal practically any transaction. It is inconceivable that the average person could be deemed to know that, under Ill. Rev. Stat. 1965, Chap. 38, Sec. 16-1, he could be prosecuted for theft. The instant case provides a clear example of how widely this ambiguous statute may be applied. It is indeed difficult to defend oneself against such a statute.

Clearly, the statute is vague, indefinite and uncertain. It is reversible error.

There was a denial of due process of law.

2. The trial court did not have jurisdiction of the subject matter of the cause.

There can be no trial, conviction or punishment for an offense without a formal and sufficient accusation. In the absence of an accusation the trial court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. The accusation must charge an offense. It must charge the particular offense for which the accused is tried and convicted. It must be made in the particular form and mode required by law.

In Illinois, a formal and sufficient accusation is required by constitutional (Ill. Const. 1870, Art. II, Sec. 9) and statutory provisions (Ill. Rev. Stat. 1965, Chap. 38,

Reasons for Granting the Writ.

1. The Illinois Statute which created the offense of theft is unconstitutional.

The Constitution of the United States provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny the equal protection of the laws. (U. S. Const. Amend, 14.)

The Constitution of the State of Illinois has a similar provision. (Ill. Const. 1870, Art. II, Sec. 2.)

The statute which created the offense of theft provides:

"A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty.

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to

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"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. The commencement of the indictment shall be, in substance, as follows:

State of Illinois)
ss
..... County)

Of the ..... term of the ..... circuit court, in the year of our Lord 18.....

The grand jurors chosen, selected and sworn, in and for the county of ..... in the name and by the authority of the People of the State of Illinois, upon their oaths, present, etc. (here insert the offense, and the time and place of committing the same, with reasonable certainty.)".

Ill. Rev. Stat. 1963, Chap. 38, Par. 716.

Although the statute was repealed, this did not eliminate the formal requisites of an indictment. The repeal reinstated the rules of the common law. The approved form was used in this state for many years and it is still used in Cook County and other parts of the state.

The caption is merely a formal statement of the proceedings. It shows the title, description and jurisdiction of the court, the place where the court was held, the time or term, and the title of the cause or the names of the parties. However, it is not a part of the indictment. (*People v. Sellers,* 30 Ill. 2d 221, *People* v. *Shaw,* 300 Ill. 451.)

The commencement sets forth the allegations relative to the grand jury. It is separate and distinct from the caption and precedes the statement of the offense.

First, It should recite that the grand jury which returned it was duly organized as a court then in session.

Second, It should recite that the grand jury was duly chosen, selected and sworn. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 112-2.)

Third, It should recite the county from which the grand jury was chosen, selected and sworn.

Fourth, It should recite that the grand jury upon oath presented the indictment. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 112-4.)

These requirements are essential to the validity of an indictment. Here, the commencement of the indictment is "The Grand Jury charges." Clearly, it is fatally defective. The defects are substantial errors which vitiate the indictment.

The charge or body of the indictment states the offense. Here, it does not state an offense.

In the absence of a statute to the contrary, it is absolutely essential for every indictment to allege by a formal conclusion, after charging the offense, that it was against the peace and dignity of the People of the State of Illinois. Here, the conclusion alleges that the offense is "in violation of Paragraph 16-1, Chapter 38, Illinois Revised Statutes." It is fatally defective.

The indictment is not in compliance with the constitution and statutory provisions, or the decisions of the court. The trial court lacked jurisdiction. It should have allowed the motion to dismiss the indictment. It is reversible error.

Again, there was a denial of due process of law.

3. The petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation.

As heretofore stated, in Illinois, a formal and sufficient accusation is required by constitutional (Ill. Const. 1870, Art. II, Sec. 9) and statutory provisions (Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3). The constitution declares that the accused shall have the right to demand the nature and cause of the accusation. The statutory provision requires that the charge shall state an offense.

Not only is the purpose of the constitution to secure an accused such specific designation of the offense charged against him as will enable him to fully prepare for his defense, but also to plead the judgment in bar of a subsequent prosecution for the same offense. (*People* v. *Peters,* 10 Ill. 2d 577.)

Generally, it is sufficient in an indictment to state the offense in the language of the statute in those cases where the statute clearly defines or describes the offense. (*Gallagher* v. *People,* 211 Ill. 158.) However, where the statute does not define or describe the act or acts constituting the offense, such acts must be specifically alleged. (*People* v. *Peters,* 10 Ill. 2d 577, *People* v. *Potter,* 5 Ill. 2d 365, *People* v. *Chiafreddo,* 381 Ill. 214, *People* v. *Green,* 368 Ill. 242, *People* v. *Brown,* 336 Ill. 257.)

While an offense may be set forth in a statute with sufficient definiteness and certainty to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to advise the accused of the nature and cause of the accusation, or to state an offense punishable under the statute, as required by the Constitution.

An indictment for theft must allege all the facts necessary to constitute the offense.

First, it must allege the method or manner in which unauthorized control was obtained or exerted over property of the owner.

Second, it must allege the time and place of the offense.

Third, it must allege the description of the property.

Fourth, it must allege the value of the property.

Fifth, it must allege the ownership of the property.

Sixth, it must allege the mental state.

Clearly, it is not sufficient to allege the offense in the language of the statute, as was stated by the court below.

Facts, and not conclusions, must be alleged. Here, the facts are lacking.

The method by or manner in which unauthorized control was obtained over the property is not alleged. It is an essential element of the offense where the accusation is made against a public officer who was lawfully possessed of the property. Here, the petitioner was the treasurer and a member of the Board of Trustees of the Cherry Valley Fire Protection District. It should allege the public office, together with all the facts relative to the taking, carrying away, * * * or possession of the property.

There is no allegation of the time and place of the offense, except the date, September 30, 1966, and the county. It appears that a series of acts over a period of time was attempted to be shown by the auditor's report which was wrongfully used by the trial court. The failure

to allege the same in the indictment is a fatal defect which renders it insufficient.

There is no description of the property whatsoever. It is not sufficient to describe the property as merely "certain checks and money." An indictment is bad unless the number, date, amount, bank, payee and maker of the checks is alleged, or copies of the checks are set forth. (*Farabee* v. *State,* ..... Tex. Cr. R. .....; 368 S.W. 2d 222, *Perry* v. *State,* 141 Tex. Cr. R. 291, 148 S.W. 2d 412, *Clines* v. *Commonwealth,* 221 Ky. 461, 298 S.W. 1107.) In *Perry* the court said, "That the check must be sufficiently described to identify it has been so frequently considered and the reason so thoroughly discussed that we deem it unnecessary to further treat the subject in this opinion." In addition, the number, kind, denomination, and the amount of the money must be alleged. An indictment which merely alleges the theft of certain checks and money or of an aggregate amount, is insufficient (*People* v. *Hunt,* 251 Ill. 446, *People* v. *Morgan,* 194 Ill. App. 514, *People* v. *Miller,* 178 Ill. App. 292, *State* v. *Robison,* 109 W. Va. 561, 155 S.E. 649), unless it discloses some legal excuse for the failure to give a more specific and proper description, such as in an indictment that it is to the grand jurors unknown. The rule, however, cannot be invoked where the particulars omitted from the indictment are within the knowledge of the grand jury (*People* v. *Hunt,* 251 Ill. 446), or can be ascertained by the exercise of ordinary diligence. Clearly, the indictment does not measure up to the requirements of the law.

There is no allegation of the value of the property. It is an essential element of the offense. (*People* v. *Mieschke,* 356 Ill. 263, *People* v. *Jackson,* 312 Ill. 611.) The value of the property must be alleged. (*People* v. *Meyers,*

397 Ill. 286, *People* v. *Crane,* 356 Ill. 276, *Brown* v. *People,* 173 Ill. 24, *Collins* v. *People,* 39 Ill. 233.) Here, the indictment alleged the value of the property as "not exceeding One Hundred Fifty Dollars ($150.00)." Clearly, the allegation is insufficient. It is the same as the "aggregate value" of a stated amount which in *State* v. *Thomes,* 126 Me. 163, 136 A. 726, and "approximate value" of a stated amount in *State* v. *Criss,* 125 W. Va. 225, 23 S.E. 2d 613, were held insufficient. The petitioner had a constitutional right to have the exact value alleged. An allegation of value is also necessary where the grade or degree of the offense, or the extent of the punishment, depends on such value.

The indictment is vague, indefinite and uncertain. It is void.

This is the most defective indictment for theft which appears in the decisions of the Illinois courts and elsewhere. It is reversible error.

Again, there was a denial of due process of law.

4. The defendant was deprived of his constitutional right to a fair trial.

(a) The auditor's report was not a part of the trial court record.

In its opinion, the Appellate Court said:

> "Various motions were filed by the defendant, including a request for a Bill of Particulars. By stipulation of the State and the defendant, an auditor's report would be allowed to stand in lieu of a Bill of Particulars. Although submitted to defendant and the court, this report was not made a part of the record."

First, the record does not contain any stipulation of the State and the defendant that an auditor's report was to

stand in lieu of a Bill of Particulars. It is completely devoid of such a stipulation.

Second, the auditor's report was not made a part of the record.

Third, although the auditor's report was not made a part of the record it was considered by the trial court in determining whether probation should be granted or denied, and also whether confinement and restitution should be made conditions of probation.

Fourth, consideration of the auditor's report by the trial court involved the use of hearsay, and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied.

Lastly, the Appellate Court by mistakenly considering a stipulation which was not made, and also considering an auditor's report which was not a part of the record, deprived the petitioner of his liberty and property without due process of law. (U. S. Const. Amend. 14, Ill. Const. 1870, Art. II, Sec. 2.)

It has long been established since as early as *Ladd and Taylor* v. *Edwards,* Breese 182, that a reviewing court cannot pass beyond the record to ascertain the facts. *People* v. *Chicago, Lake Shore and Eastern Railroad Co.,* 286 Ill. 576, 581 *Iczek* v. *Iczek,* 42 Ill. App. 2d 241, 191 N.E. 2d 648, *Klehm* v. *Klehm,* 41 Ill. App. 2d 423, 191 N.E. 2d 69. In *Mammina* v. *Alexander Auto Service Co.,* 333 Ill. 158 at page 168, the court also said:

> "* * * The record contains no such stipulation. * * * Statements of the court as to a stipulation which are not borne out by the record, are not evidence, and are not aided by the statement to the same effect by counsel seeking to establish damages. Such statements cannot take the place of evidence."

The judgment was reversed.

Clearly, the court was wrong in mistakenly considering a stipulation which was not made, and also in considering the auditor's report which was not a part of the record. Such departure from long established precedent, denied the petitioner due process of law.

Furthermore, when the court mistakenly considered a stipulation which was not made, and also considered an auditor's report which was not a part of the record, the trial court was permitted to use the auditor's report in imposing sentence. The trial court used the auditor's report in deciding that the petitioner should be imprisoned in the Illinois State Farm at Vandalia, Illinois, for a period of 5 months as a condition of probation, and also that within 30 days from the date of his release, a final amount of restitution shall be determined upon agreement of the petitioner or by the court order and within 90 days after said amount has been established, said amount shall be paid in full. The use of the auditor's report involved hearsay and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied. (U. S. Const. Amend. 6, *Berger* v. *California,* 393 U.S. 314, 89 S. Ct. 540, 21 L. ed. 2d 508 ((1969), *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. ed. 2d 923 (1965), *People* v. *Crews,* 38 Ill. 2d 331.) In *Crews* at pages 336-339, the court criticized the use of a caseworker's report by the trial court and held that the search for facts in an inquiry relative to aggravation and mitigation passed beyond reasonable bounds and was improper. The auditor's report was used in the same manner. It is reversible error.

Again, there was a denial of due process of law.

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tence to be imposed should be the one "which has the greatest potential of restoring the offender to a useful and productive place in society while at the same time adequately punishing the offender for his misconduct and safeguarding the public from further offenses . . ." The court also indicated its disapproval of a sentence which is based upon a controlling factor of restitution as a theory of penology.

The trial court should have allowed the motion to vacate this portion of the order for probation. The petitioner is entitled to a new hearing of his petition for release on probation. His confinement should be vacated. The case should be assigned to another judge who will not deprive him of his constitutional right to a fair trial. Again, there was a denial of due process of law.

(c) The condition of probation relative to restitution is void.

The Code of Criminal Procedure of 1963 which became effective January 1, 1964, in part, provides:

> "(b) A person admitted to probation may be subject to the following conditions:
>
> (4) Make restitution or reparation within the period of probation in an amount not to exceed actual loss or damage to property or medical expense resulting from bodily injury to person."
>
> Ill. Rev. Stat. 1965, Chap. 38, Sec. 117-2.

Prior thereto, the Criminal Code which was repealed as of January 1, 1964, by Act approved August 14, 1963, provided:

> "And the court may impose any one or more of the following conditions:
>
> (2) That he shall make restitution, or reparation, in whole or in part, immediately or within the peri-

od of probation to the person or persons injured or defrauded."

The word "immediately" was eliminated from the present statute.

As stated, the trial court may require a person admitted to probation to make restitution within the period of probation which, in this case, was fixed at 5 years. The court did not have the power or authority to require the petitioner to make restitution within a lesser period. In addition, the court did not have the power or authority to require that a final amount of restitution be determined upon the agreement of the petitioner or by court order. Restitution can be required only in a liquidated amount. If the amount is unliquidated, a separate civil action must determine the amount. The petitioner also has a right to a trial by jury in the determination of the same. To deprive him of this right is a denial of due process of law.

It is suggested that courts should realize that many persons inflate their claims for purposes such as insurance and restitution, and therefore only where a defendant admits a specific and definite amount, which was not done in this case, should restitution be ordered. The injured party should be left to his civil remedy if he is not satisfied. The criminal court too often allows itself to become involved with matters which are at the most a side line of justice. As stated by the California court, it is desirable for the trial court to be permitted a great deal of flexibility in imposing conditions of probation but this is not to say that every claim by one victimized directly or indirectly should be granted reparation or restitution, or that the criminal courts should be reduced to collection agencies. See *People* v. *Miller*, 64 Cal.

Rep. 20 (1967), *People* v. *Williams*, 55 Cal. Rep. 550 (1966).

In its opinion, the Appellate Court said:

> "Finally, the defendant contends that the court's order relative to restitution is void and constitutes imprisonment for debt. This contention appears premature in that there has been no breach of the requirement of restitution at this time. * * * We find that the trial court did not abuse its discretion by making restitution a condition of probation."

It appears that any subsequent order requiring an amount of restitution to be paid is presumed valid, and if a condition of probation is violated the petitioner can be sentenced to the penitentiary on the judgment of conviction. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 117-3 (d).) Has not the court condoned imprisonment for debt which was prohibited years ago? (Ill. Const. 1870, Art. II, Sec. 12.) In addition, such a sentence would be void because no person shall be twice put in jeopardy for the same offense. (U. S. Const. Amend. 5, Ill. Const. 1870, Art. II, Sec. 10.)

Clearly, the order for restitution is void.

The trial court should have allowed the motion to vacate this portion of order for probation. It is reversible error.

Again, there was a denial of due process of law.

(d) No person shall be imprisoned for debt.

As heretofore stated, a person may be admitted to probation subject to the condition that he make restitution within the period of probation. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 117-2.)

A similar provision appears in the statutes of other states. However, under such provision there is indeed a serious question whether the court may properly require the payment of any loss or damage as a condition of probation. Most of the authorities hold such a condition invalid because it deprives the petitioner of his right to have his liability determined in a proper case upon appropriate issues. It is apparent that an order which compels a person to pay a loss or damage to another on penalty of imprisonment comes perilously close to imprisonment for debt in the event that his probation is revoked upon default in payment.

Here, the amount of any loss or damage is unliquidated and undetermined. The condition is not only against public policy, but it is void. See *People* v. *Prell*, 299 Ill. App. 130, 12 N.E. 2d 637, *People* v. *Becker*, 349 Mich. 476, 84 N.W. 2d 823, *State* v. *Barnett*, 110 Vt. 221, 3 A. 2d 521.

The trial court did not have jurisdiction to impose the condition. It also did not have the power or authority to do so. It is reversible error.

Again, there was a denial of due process of law.

Conclusion.

This case involves substantial federal questions.

There has been a substantial denial of the constitutional rights of the petitioner. He did not have a fair trial. It is the greatest human right that an accused has. Illinois has deprived him of his liberty and property without due process of law in violation of the Constitution of the United States and of the State of Illinois. It has also denied him the equal protection of the laws.

In order that justice may be done, this court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Appendix.

A.

Constitutions

Constitution of the United States

Articles in Addition to, and Amendment of, the Constitution.

Amendment V

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" * * *

Amendment VI

"In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;" * * *

Amendment XIV

"Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Illinois

Adopted in Convention at Springfield, May 13, 1870. Ratified by the People, July 2, 1870. In force August 8, 1870.

Article II

Bill of Rights

"Section 2. No person shall be deprived of life, liberty or property, without due process of law.

Section 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Section 10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Section 12. No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in cases where there is a strong presumption of fraud."

B.

Statutes

An Act relating to criminal law and to repeal acts and parts of acts herein named. Approved July 28, 1961. L. 1961, p. 1983. Effective January 1, 1962.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

"Section 16-1. Theft.) A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty.

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution

other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years."

Ill. Rev. Stat. 1965, Chap. 38, Sec. 16-1.

An Act relating to criminal law and procedures and to repeal acts and parts of acts herein named. Approved Aug. 14, 1963. L. 1963, p. 2836. Effective Jan. 1, 1964.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

"Section 111-3. Form of Charge.) (a) A charge shall be in writing and allege the commission of an offense by:

(1) Stating the name of the offense;

(2) Citing the statutory provision alleged to have been violated;

(3) Setting forth the nature and elements of the offense charged;

(4) Stating the time and place of the offense as definitely as can be done; and

(5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

(b) An indictment shall be signed by the foreman of the Grand Jury and an information shall be signed by the State's Attorney and sworn to by him or another. A complaint shall be sworn to and signed by the complainant."

Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3.

"Section 112-2. Impaneling the Grand Jury.) (a) The Grand Jury shall consist of 23 persons, 16 of whom shall be necessary to constitute a quorum.

(b) The Grand Jury shall be impaneled, sworn and instructed as to its duties by the court. The court shall select and swear one of the grand jurors to serve as foreman.

(c) Before the Grand Jury shall enter upon the discharge of their duties the following oath shall be administered to the jurors:

'You and each of you do solemnly swear (or affirm, as the case may be), that you will diligently inquire into and true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge, touching the present service; you shall present no person through malice, hatred or ill-will; nor shall you leave any unpresented through fear, favor, affection, or for any fee or reward, or for any hope or promise thereof; but in all of your presentments, you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding; so help you God.'"

Ill. Rev. Stat. 1965, Chap. 38, Section 112-2.

"Section 117-1. Admission to Probation.) (a) A person who has been found guilty of any offense except a capital offense, the sale of narcotics or rape may be admitted to probation when it appears that:

(1) The defendant is not likely to commit another offense;

(2) The public interest does not require that the defendant receive the penalty provided for the offense; and

(3) The rehabilitation of the defendant does not require that he receive the penalty provided for the offense.

(b) The term of probation may be for any period not less than 6 months and not to exceed 5 years. The court may for good cause extend the period of probation for not more than an additional 2 years.

(c) A person admitted to probation shall remain subject to the jurisdiction of the court.

(d) The judgment of guilty entered prior to the admission of defendant to probation shall be a final judgment subject to review under Article 121 of this Code.

Section 117-2. Conditions of Probation.) (a) A person admitted to probation shall be subject to the following conditions:

(1) Not violate any penal statute or ordinance of any jurisdiction.

(2) Not leave the State without the consent of the court.

(3) Make a report to such person or agency and at such times as the court may direct and shall appear in person before the court at such time as the court may direct.

(4) Execute a recognizance in accordance with the provisions of Article 110 of this Code.

(b) A person admitted to probation may be subject to the following conditions:

(1) Imprisoned in a place of confinement other than a penitentiary for a period not to exceed one year and in no event to exceed the maximum penalty provided for the offense.

(2) Pay within a period set by the court a fine not to exceed the maximum provided for the offense.

(3) Pay the cost of the proceedings as set by the court.

(4) Make restitution or reparation within the period of probation in an amount not to exceed actual loss or damage to property or medical expense resulting from bodily injury to person.

(5) Perform or refrain from performing such other acts as may be ordered by the court.

Section 117-3. Violation of Probation.) (a) When within the period of probation a petition charging a violation of a condition of probation is presented to the court whch admitted the person to probation the court may issue a warrant for the arrest of the probationer.

(b) When a warrant is issued the court shall within a reasonable time after the apprehension of the probationer conduct a hearing on the issue of the probation violation. The probationer may be admitted to bail pending the hearing. At the hearing the State shall have the burden of proving the violation.

(c) If the court determines that the conditions of probation have not been violated the probationer shall be continued on probation.

(d) If the court determines that a condition of probation has been violated, the court may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offense of which the probationer was convicted.

(e) The defendant may appeal from any judgment altering the conditions of or terminating probation."

Ill. Rev. Stat. 1965, Chap. 28, Sec. 117-1, 117-2, 117-3.

C.

Opinion of the Appellate Court of Illinois

Second Judicial District
January 23, 1969
Rehearing Denied February 24, 1969
104 Ill. App. 2d 415, 244 N.E. 2d 212

Mr. Presiding Justice Abrahamson delivered the opinion of the Court:

This is an appeal from an order of the Circuit Court of Winnebago County granting the defendant probation.

The defendant, Roy Curtis Cleveland, was indicted for the offense of theft on December 14, 1966. On January 4, 1967, the defendant entered a plea of not guilty. Various motions were filed by the defendant, including a request for a Bill of Particulars. By stipulation of the State and the defendant, an auditor's report would be allowed to stand in lieu of a Bill of Particulars. Although submitted to defendant and the court, this report was not made a part of the record. On July 17, 1967, defendant withdrew his plea of not guilty and entered a plea of guilty. This plea was accepted. Leave was granted the defendant to file a petition for probation and the case was continued to October 31, 1967. On that date defendant was admitted to probation for a period of five years, conditioned upon his confinement to the Illinois State Farm at Vandalia, Illinois, for a term of five months beginning on November 27, 1967, and also that within 30 days from his release therefrom that a final amount of restitution be determined by agreement of the defendant or by court order; that within 90 days after the amount of restitution had been established by agree-

ment or by order of court, the amount should be paid in full.

The defendant was, at the time of trial, a man of 72 years of age, a resident of Cherry Valley, Illinois, and, prior to the indictment, had been the treasurer and a member of the Board of Trustees of the Cherry Valley Fire Protection District.

The indictment returned herein provided:

> "That on the 30th day of September, 1966, in the County of Winnebago and State of Illinois, one Roy Curtis Cleveland committed the offense of Theft, in that he knowingly obtained unauthorized control over certain checks and money of the legal money and currency of the United States of America, having a value exceeding One Hundred Fifty Dollars ($150.00), the property of Cherry Valley Fire Protection District, a municipal corporation, Roy Curtis Cleveland thereby intending to deprive Cherry Valley Fire Protection District, a municipal corporation, permanently of the use or benefit of said property, in violation of Paragraph 16-1, Chapter 38, Illinois Revised Statutes."

Defendant appealed directly to the Supreme Court of this state. The Court found that defendant's assertions of constitutional claims were lacking in substance and transferred the appeal to this Court.

The defendant's contention that the indictment fails to contain on the face some words to the effect that the Grand Jury was duly selected and sworn and made the presentment of the indictment has heretofore been passed upon by this court in *People* v. *Marks*, 63 Ill. App. 2d 384, 387, wherein we found there was no necessity of reciting on the face of an indictment compliance with

Criminal Law and Procedure, ch. 38, sec. 112, par. 1-4 (Ill. Rev. Stat. 1965) nor does the Legislature so require.

Section 16-1 of the Criminal Code (ch. 38, sec. 16-1, Ill. Rev. Stat. 1965) provides:

"A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit. . . ."

Defendant contends that the statute is unconstitutional in that it is vague, indefinite and uncertain. Section 16-1 defines the two elements necessary to constitute a theft—a proscribed act and the requisite intent. A combination of any one of the enumerated acts and any one of the enumerated mental states describes the prohibited offense. *People* v. *Jackson,* 66 Ill. App. 2d 276, 279. The test to be applied to a statute is whether it is sufficiently definite and certain to enable all men to know what acts are proscribed and what conduct will make them liable to punishment. *The People* v. *Patrick,* 38 Ill. 2d 255, 257, 258; *People* v. *Williams,* 79 Ill. App. 2d 56, 59, 60. We

find that sec. 16-1 (a) adequately apprises the defendant of the charge against him and encompasses the highly technical description of embezzlement by a public officer before codification, namely that the defendant knowingly exerted unauthorized control over the property of another. The codification, by the Committee Comments, was to abolish completely the labels and highly technical distinctions which have developed through centuries of caselaw and statutory amendments.

Defendant's second and third contentions are interrelated in that they are both based on the position that the statute does not sufficiently define the elements necessary to define theft. Defendant contends that if the statute is insufficient, the trial court did not gain jurisdiction. He then contends that if the statute insufficiently defines the offense, that an indictment charging in the language of the statute is deficient. As stated above, we have found the statute sufficiently defines the elements necessary to constitute theft. Therefore, we find the trial court had jurisdiction and that the indictment framed in the language of the statute is sufficient. *The People* v. *Patrick, supra; The People* v. *Robinson,* 372 Ill. 503, 506; *People* v. *Jackson,* 66 Ill. App. 2d 276, 280.

Defendant next contends that the provisions of the Code of Criminal Procedure of 1963, ch. 38, sec. 117-2 (Ill. Rev. Stat. 1963) are void and unconstitutional in that it leaves to the discretion of the judge to require the defendant to serve a portion of his sentence in confinement before being released on probation. The provisions of this section constitute no material change to the previous law as stated in ch. 38, sec. 787 (Ill. Rev. Stat. 1961). It was proper to require defendant to serve six months in confinement at the Illinois State Farm at

Vandalia, Illinois, as a condition of his probation. *People* v. *Adams,* 342 Ill. App. 625, 632.

Finally, the defendant contends that the court's order relative to restitution is void and constitutes imprisonment for debt. This contention appears premature in that there has been no breach of the requirement of restitution at this time. In support of this contention defendant relies upon *People* v. *Prell,* 299 Ill. App. 130, 133. We find this case to be inapplicable to the facts before us. In that case the order of probation complained of required the defendant to pay $500 as the supposed damages inflicted in an automobile accident as a result of defendant's wilful and wanton driving. The court held at page 133 that such payment "could not be regarded as restitution 'within the meaning of the law . . .'". We find that the trial court did not abuse its discretion by making restitution a condition of probation.

For the above stated reasons we find the decision of the trial court should be affirmed.

Judgment Affirmed.

MORAN and SEIDENFELD, JJ., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 591

ROY CURTIS CLEVELAND,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Roy Curtis Cleveland, the petitioner herein, and presents his petition for rehearing in the above entitled cause, upon the grounds, and for the reasons hereinafter set forth.

Questions Not Previously Presented.

1. Whether the petitioner had a constitutional right to a full appellate review by the Supreme Court of Illinois.

2. Whether the indictment bars a subsequent prosecution for the same offense.

3. Whether cruel and unusual punishment was inflicted.

4. Whether the imposition of the condition of probation relative to restitution constitutes involuntary servitude.

5. Whether the petitioner was deprived of his constitutional right to a fair trial.

Reasons For Granting Rehearing And Writ.

1. Petitioner had a constitutional right to a full appellate review by the Supreme Court of Illinois.

The new Judicial Article of the Constitution of the State of Illinois vested the judicial power in a Supreme Court, an Appellate Court and Circuit Courts. (Ill. Const. 1870, Art. VI, Sec. 5.)

The Judicial Article, among other things, provides that appeals from the final judgments of circuit courts shall lie directly to the Supreme Court as a matter of right in cases involving a question arising under the Constitution of the United States or of this State.

Here, an appeal from the final judgment of the Circuit Court was taken directly to the Supreme Court of Illinois as a matter of right. The State filed a motion to transfer the cause to the Appellate Court of Illinois, Second Judicial District, because a constitutional question was not involved. Objections thereto were filed by the petitioner. The motion was allowed and the cause transferred because a substantial constitutional question was not involved.

As shown in the petition for certiorari, this case involves questions arising under both constitutions.

The Judicial Article does not require that the case involve a substantial question. If it had been so intended, the word, substantial, would have been inserted in the proposed Judicial Article which was submitted to the electors at the general election in the State of Illinois

which was held on November 2, 1962, and was approved by them. The electors have spoken. Their decision is final. The Supreme Court of Illinois is not empowered to enlarge or limit their act.

The Supreme Court of Illinois had jurisdiction to review the final judgment of the Circuit Court. The appeal is a matter of right. To deprive the petitioner of the same violates both constitutions.

The appeal should have been heard by the Supreme Court of Illinois.

There was a flagrant denial of due process of law.

2. The indictment does not bar a subsequent prosecution for the same offense.

An intelligent and full understanding by the accused of the accusation against him is the first requirement of due process of law. To afford due process of law an indictment must fairly inform him of the charge against him and contain a statement of the acts which constitute the offense with reasonable definiteness and certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense and enable him to plead the judgment in bar of a subsequent prosecution for the same offense. (*People* v. *Peters*, 10 Ill. 2d 577.)

The indictment shall be a plain, concise and definite written instrument of the essential facts constituting the offense charged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C.) The Illinois statute requires that the charge shall state an offense. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3.)

Notwithstanding these provisions, the courts below repeatedly have held that a charge in an indictment, even though in the language of the statute creating the offense, is not sufficiently specific and definite unless the statute, in creating the offense, specifically defines or describes the act or acts constituting the offense, so that the charge may be easily understood.

Generally, it is sufficient in an indictment to state the offense in the language of the statute in those cases where the statute clearly defines or describes the offense. (*Gallagher* v. *People*, 211 Ill. App. 158, *Brennan* v. *People*, 113 Ill. App. 361.) Where the statute, however, does not define or describe the act or acts constituting the offense, such acts must be specifically alleged. (*People* v. *Peters*, 10 Ill. 2d 577, *People* v. *Potter*, 5 Ill. 2d 365, *People* v. *Chiafreddo*, 381 Ill. 214, *People* v. *Green*, 368 Ill. 242, *People* v. *Brown*, 336 Ill. 257.)

Clearly, it is not sufficient to allege the offense of theft in the language of the statute, as was stated by the court below.

While an offense may be set forth in a statute with sufficient definiteness and certainty to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to inform the accused of the nature and cause of the accusation, or to state an offense punishable under the statute, as required by the Constitution. Rather, where the statute does not define or describe the act or acts constituting the offense created, they must be specifically alleged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C., Ill. Rev. Stat. 1965, Chap. 38, Sec. 111-3.)

Here, the facts are lacking.

The method by or manner in which unauthorized control was obtained over the property of the owner is not alleged. Surely, it is an essential element of the offense where the accusation, as in this case, is made against a public officer who was lawfully possessed of the property. The petitioner was the treasurer and a member of the Board of Trustees of the Cherry Valley Fire Protection District. The indictment should allege the public office, together with all the facts relative to the taking, carrying away, * * * or possession of the property.

There is no allegation of the time and place of the offense, except the date, September 30, 1966, and the county. It appears that a series of acts over a period of time was attempted to be shown by an Auditor's Report (See opinion of court below) which was wrongfully used by the trial judge. The failure to allege the same in the indictment is a fatal defect which renders it insufficient.

Likewise, there is no description of the property whatsoever. It is not sufficient to describe the property as merely "certain checks and money." An indictment is bad unless the number, date, amount, bank, payee and maker of the check or checks is alleged, or a copy thereof is attached as an exhibit. (*Farabee* v. *State,* ..... Tex. Cr. R. ....., 368 S.W. 2d 222, *Perry* v. *State,* 141 Tex. Cr. R. 291, 148 S.W. 2d 412, *Clines* v. *Commonwealth,* 221 Ky. 461, 298 S.W. 1107.) In *Perry* the court said,

> "That the check must be sufficiently described to identify it has been so frequently considered and the reason so thoroughly discussed that we deem it unnecessary to further treat the subject in this opinion."

In addition, the number, kind denomination, and amount of money must be alleged. An indictment which merely alleges the theft of certain checks and money, or of an aggregate amount is insufficient. Clearly, the indictment does not measure up to the requirements of the law.

Finally, there is no allegation of the value of the property. It is an essential element of the offense. (*People* v. *Mieschke,* 356 Ill. 263, *People* v. *Jackson,* 312 Ill. 611.) The value of the property must be alleged. (*People* v. *Meyers,* 397 Ill. 286, *People* v. *Crane,* 356 Ill. 276, *Brown* v. *People,* 173 Ill. 24, *Collins* v. *People,* 39 Ill. 233.) Here, the indictment alleged the value of the property as "not exceeding One Hundred Fifty Dollars ($150.-00)." Clearly, the allegation is insufficient. The petitioner had a constitutional right to have the exact value alleged. An allegation of value is also necessary where the grade or degree of the offense, or the extent of the punishment, depends on such value.

A diligent search has been made, but no case has been found which is squarely in point one way or the other. Perhaps one reason for the inability to find such a case is that it appears from the reported cases that through the years draftsmen of indictments have made it a practice to allege the facts in greater detail. It must be kept in mind in this connection that an accused is presumed to be innocent until he is proven guilty beyond a reasonable doubt and to a moral certainty, and that an indictment must be tested upon the presumption that the accused has no knowledge of the facts charged against him. (*White* v. *United States,* 10 Cir., 67 F. 2nd 71.) It is also indeed significant that the State did not cite a single case in the court below which was in point.

The indictment is vague, indefinite and uncertain. It is void.

The petitioner, however, was deprived of substantial rights. He was greatly prejudiced thereby. Although the constitutionality of the Illinois statute and other substantial federal questions are involved, the insufficiency of the indictment is the most important issue raised. It is the most defective indictment which appears in the reported cases. It so grossly violates the 14th Amendment to the Constitution of the United States that justice requires a reconsideration of the indictment.

The motion to dismiss the indictment should have been allowed by the trial court. The judgment of the court below should be vacated.

Again, there was a denial of due process of law.

3. Cruel and unusual punishment was inflicted.

The 8th Amendment to the Constitution of the United States states, in part, that "cruel and unusual punishments (shall not be) inflicted."

This amendment has its origin in a 1688 Act of Parliament. When it was being debated in Congress a member "objected to the words 'nor cruel and unusual punishment' the import of them being too indefinite." (Annals of Congress 754 (1791)). Another member objected:

> ". . . it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the

> Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." *Ibid.*

The older cases held that this amendment does not apply to the states. In later cases, first by dicta (*Louisiana* v. *Resweber,* 329 U.S. 459 (1946)), and then by express holding (*Robinson* v. *California,* 370 U.S. 660 (1962)), it was ruled that the 8th Amendment is applicable to the states under the due process clause of the 14th Amendment.

In *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), the Court upheld execution by shooting as against the objection that it was cruel and unusual.

Construing a similar clause in the New York State Constitution the Court said in *In Re Kemmler,* 136 U.S. 436, 446 (1890):

> "... So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

A California law which made the "status" of narcotic addiction a criminal offense was held to be a cruel punishment. (*Robinson* v. *California,* 370 U.S. 660 (1962).) A jail sentence of three to ten years for "practicing law without a license" does not constitute "cruel and unusual punishment." (*Morgan* v. *U. S.,* 309 F. 2d 234 (1962).) Imposition of severe penalties for sex crimes is not cruel and unusual punishment. (*U. S.* v. *Wilkins,* 305 F. 2d 715, cert. den. 371 U.S. 929 (1962); *Maxwell* v. *Stephens,* 229 F. Supp. 205, 217 (1964).)

However, in *Rudolph* v. *Alabama,* 375 U.S. 889 (1963), where the majority refused to grant certiorari to review a death sentence for rape, three justices joined in this dissent:

> "(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of (our) maturing society,' or 'standards of decency more or less universally accepted?'
>
> "(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged?'
>
> "(3) Can the permissible aims of punishment (e. g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e. g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?' "

And in *Trop* v. *Dulles,* 356 U.S. 86 (1959), forfeiting the citizenship of a soldier who deserts in time of war was called a cruel and unusual punishment by the Chief Justice and three other justices constituting the majority.

A similar result was reached in *Rusk* v. *Cort,* 372 U.S. 144 (1963), where a statutory forfeiture of the citizenship of a draft evader who moved to Czechoslovakia was set aside as an unconstitutional punishment. And suspension of sentence on the ground that the immigrant perjurer depart from the United States was held to be a cruel and unusual punishment in *Dear Wing Jung* v. *U. S.,* 312 F. 2d 72 (1962).

On the other hand forfeiting the citizenship of one who served as military executioner for Fidel Castro was

upheld in *U. S. ex rel Herman Marks* v. *Esperdy,* 315 F. 2d 673, affirmed 12 L. Ed. 2d 292 (1963), over the argument that "it imposes a cruel and inhuman punishment in violation of the Eighth Amendment."

Inclusion of 20 lashes as part of defendant's sentence for robbery does not constitute cruel and unusual punishment. (*Balser* v. *State,* Del. 195 A. 2d 757 (1963).) And in the much-publicized St. Louis Jefferson Bank lie-in demonstrations, it was held that jail sentences of up to 270 days for indirect contempt in violating a temporary restraining order were not cruel and unusual punishments. (*Curtis* v. *Tozer,* Mo. App. 374 S.W. 2d 557 (1964).)

As indicated, the cruel and unusual punishments clause is the object of increased attention by lawyers and courts. Some contend that the words are being stretched too far and that the Father of our Country would be startled to read recent opinions saying that it is a cruel and unusual punishment to deprive a wartime deserter or draft dodger of citizenship. For instance, Justice Frankfurter, dissenting in *Trop* v. *Dulles,* 356 U.S. 86 (1958), said at page 125:

> ". . . To insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"

Others rejoice that the courts are so conscious of the language of the Bill of Rights.

Various courts have considered the cruel and unusual punishments provision, but because of the very nature of the provision no fixed definition has been attempted. In *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), this Court said at pages 135-136:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, * * * and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

Here again, it is the nature of the crime and the particular facts and circumstances, considered in the light of contemporary human standards, which determine whether a particular punishment is cruel and unusual. As a punishment for certain serious crimes, the death penalty is not cruel and unusual, whether executed by shooting, *Wilkerson* v. *Utah,* 99 U.S. 130 (1879), or by lethal gas, *Hernandez* v. *State,* Ariz. 32 P. 2d 18 (1934). Nor in a recent case was a sentence of 3 years imprisonment plus 20 lashes for grand larceny considered by a State court to be a violation of the 8th Amendment. (*Cannon* v. *Delaware,* Del. 196 A. 2d 399 (1963).)

On the other hand, where a statute prescribed a penalty of from 12 to 20 years imprisonment plus a fine for "entry of known false statements in a public record" it was found to be so out of proportion to the crime as to constitute cruel and unusual punishment. (*Weems* v. *United States,* 217 U.S. 349 (1910).) Similarly, this Court determined that a California statute which punished narcotics addiction as a crime was a cruel and unusual punishment. In *Robinson* v. *California,* 370 U.S. 660 (1962), this Court said at page 666:

> "(I)n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

It is not always easy, however, for courts or judges to agree as to what constitutes cruel and unusual punishment. In 1947, a most unusual case arose. A man named Francis was convicted of murder in Louisiana and was sentenced to death. As was customary, the electric chair was brought to the local jail for the execution. On May 3, 1946, Francis was duly "electrocuted" but the shock failed to kill him or even to injure him seriously. A new warrant was issued for his execution, but he argued that it would be cruel and unusual punishment to execute him twice for the same crime. Four Justices assumed, without deciding, that the 8th Amendment applied to the State, but under the circumstances they did not consider a second execution to be cruel and unusual punishment. Another Justice indicated that the 8th Amendment did not apply to the State, but that the Due Process Clause of the 14th Amendment would, itself, bar cruel and unusual punishment. He did not, however, consider the second execution to be a violation of due process in this case. Four dissenting Justices, however, described the case as "death by installments" and thought that the second execution should be barred by the 8th and 14th Amendments. *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947). Ultimately, Francis was executed. See Prettyman, Death and the Supreme Court, Ch. 3 (1961).

To be cruel and unusual punishment need not involve physical suffering. In *Trop* v. *Dulles,* 356 U.S. 86 (1958),

this Court held that the loss of citizenship as punishment for wartime desertion from the military was cruel and unusual punishment barred by the 8th Amendment. This Court said at page 101:

> "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."

It should be clear that the 8th Amendment is not a relic of the "Dark Ages." Many problems remain today.

In recent years, nationwide attention has been focused on the question whether long delay of execution is in itself a cruel and unusual punishment. In the *Chessman* case the argument was made—and rejected—that repeated postponement of execution, even though occasioned by the legal actions instituted by the condemned man, resulted in such mental strain that execution after long delay would be cruel and unusual punishment. A similar argument might be made in the case of one whose execution was postponed because of insanity, but who, regaining sanity after several years, is ordered to be executed. Indeed, some have raised the question whether, by contemporary standards, the death penalty itself might not be cruel and unusual punishment.

The 8th Amendment, then, like the other amendments, leaves many questions still unanswered, but the sentence of an aged person who is not in good physical condition to the Illinois State Farm is cruel and unusual punishment.

Again, there was a denial of due process of law.

4. The imposition of the condition of probation relative to restitution constitutes involuntary servitude.

The 13th Amendment to the Constitution of the United States provides:

> "Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The amendment had as its aim the maintenance of a system of completely free and voluntary labor throughout the United States. Accordingly, there is no rule of law under which any man in this country will be forced to serve with his labor any other man whom he does not wish to serve.

As used in the amendment, "involuntary servitude" is the condition of one who is compelled by force, coercion, or imprisonment and against his will to labor for another whether or not he is paid, and includes "peonage".

The leading purpose of the amendment was to abolish African slavery in the United States. But the addition of the words "involuntary servitude" to the prohibition of the amendment gave it a broader scope, and it has been applied to any servitude in fact involuntary, no matter under what form such servitude may have been disguised. (*Butler* v. *Perry,* 240 U.S. 328, 332, 36 S. Ct. 258, 60 L. ed. 672 (1916).) The constitutional guaranty, however, does not prevent the enactment of a law requiring the performance of labor in the public service, as in working the public roads or otherwise in lieu of taxes.

The service of seamen is regarded as exceptional (*Robertson* v. *Baldwin,* 161 U.S. 275, 17 S. Ct. 326, 41 L. ed. 715 (1897)), and accordingly seamen who have voluntarily entered into a contract for a period of service are held to have surrendered for the time their personal liberty, so that neither the contract itself nor a statute authorizing it constitutes a violation of the guaranty.

Involuntary servitude as a punishment for crime whereof the party has been duly convicted is expressly exempted from the operation of the amendment and may therefore be required. (*Loeb* v. *Jennings,* 133 Ga. 796, 67 S.E. 101, *Nelson* v. *People,* 33 Ill. 390 (decided in 1864 under a statute making it a crime for a negro or mulatto to come into the state, and holding the statute valid notwithstanding the prohibition of slavery and involuntary servitude in the state constitution)).

And the term "crime" as used in the amendment includes misdemeanors (*Stone* v. *Paducah,* 120 Ky. 322, 86 S.W. 531; *In Re Bergin,* 31 Wis. 383), and violations of municipal ordinances (*Loeb* v. *Jennings,* 133 Ga. 796, 67 S.E. 101, *Chicago* v. *Williams,* 254 Ill. 360, 98 N.E. 666, *Chicago* v. *Coleman,* 254 Ill. 338, 98 N.E. 521).)

Mere imprisonment is not servitude (*Smolczyk* v. *Gaston,* 147 Neb. 681, 24 N.W. 2d 862), but labor enforced as a punishment is involuntary servitude.

The petitioner was sentenced to the Illinois State Farm. He is required to work on the farm. (Ill. Rev. Stat. 1969, Chap. 118, Sec. 16). This constitutes involuntary servitude.

In addition, to an aged person who is not in good physical condition, but is required to work, the sentence may constitute a death sentence.

Again, there was a denial of due process of law.

5. Petitioner was deprived of his constitutional right to a fair trial.

In all criminal prosecutions, an accused, guilty or innocent, is entitled to a fair trial. It is the greatest human right that he has.

It is the duty of the trial judge to so conduct the proceedings that the accused will have a fair trial. It is not a mere formality, but it is a substantial right.

Here, the petitioner filed a motion for a change of venue from all the judges of the county. The motion was granted by the Chief Judge. An Associate Judge from another Judicial Circuit was assigned by the Supreme Court of Illinois to hear the case.

He first heard a motion to dismiss the indictment. In it the petitioner, among other things, raised the constitutionality of the statute upon which the indictment was based. He held the statute constitutional and the indictment sufficient. The indictment was void, but the motion was denied.

The petitioner entered a plea of guilty to the indictment which charged the theft of "certain money and checks", having a value of $150.00. It was accepted.

Although an auditor's report showed a purported loss of a large sum of money, it was not a part of the trial court record. It was incomplete and contained comments, statements and conclusions. It also was not verified.

First, the record does not contain any stipulation of the State and the petitioner that an auditor's report was to stand in lieu of a bill of particulars. It is completely devoid of such a stipulation.

Second, the auditor's report was not made a part of the record.

Third, although the auditor's report was not made a part of the record, it was considered by the trial judge in determining whether probation should be granted or denied, and also whether confinement and restitution should be made conditions of probation.

Fourth, consideration of the auditor's report by the trial judge involved the use of hearsay, and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied.

Lastly, the court below by mistakenly considering a stipulation which was not made, and also considering an auditor's report which was not a part of the record, deprived the petitioner of his liberty and property without due process of law.

Clearly, the court below was wrong in mistakenly considering a stipulation which was not made, and also in considering an auditor's report which was not a part of the record. Such a departure from long established precedent denied the petitioner due process of law.

Furthermore, when the court below mistakenly considered a stipulation which was not made, and also considered an auditor's report which was not a part of the record, the trial judge was permitted to use the auditor's report in imposing sentence. The trial judge used the auditor's report in deciding that the petitioner should be imprisoned in the Illinois State Farm at Vandalia, Illinois, for a period of five months as a condition of probation, and also that within 30 days from the date of his release, a final amount of restitution shall be determined upon agreement by the petitioner or by the

court order and within 90 days after said amount has been established, said amount shall be paid in full. The use of the auditor's report involved hearsay and the right of cross examination as to the validity and accuracy of the purported examination by the auditor was denied. (U. S. Const. Amend. 6, *Berger* v. *California,* 393 U.S. 314, 89 S. Ct. 540, 21 L. ed. 2d 508 (1969), *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. ed. 2d 923 (1965), *People* v. *Crews,* 38 Ill. 2d 331 (1967).)

It appears that the court below did not consider whether the trial judge abused its discretion in requiring confinement as a condition of probation. (A. 22.)

First, the trial judge allowed his strong feeling relative to public officers to influence his judgment concerning confinement. He said that he had strong feelings about what should be done with public officers who violated the public trust. His remarks were indeed prejudicial. The recent case of *People* v. *McAndrew,* 96 Ill. App. 2d 441, 239 N.E. 2d 314, 319 (1968), is applicable here. In that case the strong feelings of the trial judge relative to "hippies and narcotics" influenced his decision concerning the sentence imposed. Although probation was granted in this case, subject to the condition that the petitioner serve five months confinement, the theory of *McAndrew* is applicable.

Contrary to the recommendation of the probation officer, the trial judge imposed confinement. It was an arbitrary abuse of discretion.

Second, the court below did not mention the fact that the petitioner had not been involved in any prior trouble. He had served as a Justice of the Peace. He is also a veteran of World War I. He was then 72 years of age and not in physical condition to serve any confinement,

particularly in the Illinois State Farm where he would be associated with the usual misdemeants imprisoned there. Failure to consider these factors constituted an abuse of discretion by the trial judge in imposing five months confinement as a condition of probation. The probation officer had recommended probation. He had made the investigation and was familiar with the background, life, family, previous occupations and public service of the petitioner. The trial judge who was from another Judicial Circuit and was an Associate Judge and not a full Circuit Judge lacked experience, but he was determined to impose confinement as a condition of probation. Surely, conviction and probation without confinement, coupled with many articles in the press, was sufficient punishment against any person who did not have a prior record. Neither the public interest nor the rehabilitation of the petitioner required that he receive the penalty provided for the offense or any other penalty. (Ill. Rev. Stat. 1965, Chap. 38, Sec. 117-1.) The recent case of *People* v. *Harpole,* 97 Ill. App. 2d 28, 239 N.E. 2d 471 (1968), indicates that the sentence to be imposed should be the one

> "which has the greatest potential of restoring the offender to a useful and productive place in society while at the same time adequately punishing the offender for his misconduct and safeguarding the public from further offenses . . ."

The court also indicated its disapproval of a sentence which is based upon a controlling factor of restitution as a theory of penology.

It appears that the trial judge was biased and prejudiced against the petitioner. A good judge is fair and impartial at all times. He should not consider any im-

proper evidence. He should at all times maintain an impartial attitude in his acts, conduct and demeanor. The utmost care should be exercised because any comment or remark which is shown to be prejudicial to the rights of the accused, or which it may be assumed prejudice will result therefrom, is fatal to the validity of the trial.

The petitioner is entitled to a new hearing of his petition for release on probation. His confinement and restitution should be vacated. The case should be assigned to another judge who will not deprive him of his constitutional right to a fair trial.

Again, there was a denial of due process of law.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

JOHN R. SNIVELY,
Counsel for Petitioner.